# Abdul Rahim bin Abdul Hamid & Ors v Perdana Merchant Bankers Bhd (formerly known as Intradagang Merchant Bankers (M) Bhd) as trustee, manager and agent

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–106 OF 2001
GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND HASHIM YUSOFF JJCA
16 AUGUST 2004

*Civil Procedure — Appeal — Finding of fact by trial judge — Whether appellate court should interfere*

This was an appeal directed against the orders made by the High Court in a consolidated action of two suits. In one of these suits, *viz*, D1–22–501 of 1994 ('the KL action'), the plaintiffs were the lenders of a sum of RM20 million to the fifth appellant in this appeal. They sought to recover their loan from the fifth appellant as borrower and from the first to the fourth appellants as guarantors of the loan. In the other suit, 22–98 of 1994 ('the Johor Bahru action'), the plaintiff was the fifth appellant and the defendants were the first respondent as trustee and agent of the other lenders as well as the receiver and manager appointed by the lenders over the business and affairs of the fifth appellant. The gist of the Johor Bahru action was that the first defendant in that action acted negligently and in breach of the terms and conditions of the loan agreement. The consolidated actions came on for hearing before the High Court at Kuala Lumpur. The learned judge who heard the matter dismissed the Johor Bahru action and entered judgment for the lenders in the KL action. Hence, this appeal was filed against the dismissal of the Johor Bahru action.

**Held**, dismissing appellants' appeal with costs:

The findings made by the learned High Court judge were of pure fact based on the credibility of the witnesses called by the parties before him. This court will not as a general rule, interfere with questions of fact decided by a trial court based on the credibility of witnesses seen and heard by that court (see para 4).

[**Bahasa Malaysia summary**

Ini adalah rayuan terhadap perintah yang dibuat oleh Mahkamah Tinggi dalam dua tindakan yang disatukan. Dalam salah satu guaman tersebut, iaitu D1–22–501 tahun 1994 ('tindakan KL'), plaintif-plaintif adalah pemberi pinjaman sejumlah RM20 juta kepada perayu kelima dalam rayuan ini. Mereka memohon mendapat kembali pinjaman mereka daripada perayu kelima sebagai peminjam dan daripada perayu-perayu pertama hingga kelima sebagai penjamin pinjaman tersebut. Dalam guaman satu lagi, 22–98 tahun 1994, ('tindakan Johor Bahru'), plaintif adalah perayu kelima dan defendan-defendan

adalah responden pertama sebagai pemegang amanah dan ejen peminjam-peminjam lain dan juga sebagai penerima dan pengurus yang dilantik oleh peminjam-peminjam berhubung perniagaan dan urusan perayu kelima. Secara ringkasnya tindakan Johor Bahru adalah bahawa defendan pertama dalam tindakan itu telah bertindak secara cuai dan melanggar terma-terma dan syarat-syarat perjanjian pinjaman. Tindakan-tindakan yang disatukan telah didengar di Mahkamah Tinggi di Kuala Lumpur. Hakim yang bijaksana yang mendengar perkara tersebut telah menolak tindakan Johor Bahru dan memasuki penghakiman menyebelahi peminjam-peminjam dalam tindakan KL. Justeru itu, rayuan ini telah difailkan terhadap penolakan tindakan Johor Bahru.

**Diputuskan**, menolak rayuan perayu-perayu dengan kos:

Penemuan-penemuan yang dibuat oleh hakim Mahkamah Tinggi yang bijaksana adalah fakta semata-mata yang berdasarkan kebolehpercayaan saksi-saksi yang dipanggil oleh pihak-pihak di hadapan beliau. Mahkamah ini tidak boleh, mengikut rukun am, campur tangan dengan persoalan-persoalan fakta yang diputuskan oleh mahkamah perbicaraan berdasarkan kebolehpercayaan saksi-saksi yang telah dilihat dan didengar oleh mahkamah itu (lihat perenggan 4).]

**Notes**

For cases on appeal generally, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 526–1264.
For cases on finding of fact by trial judge, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) para 839.
For cases on finding of facts, see 2 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 729–819.

Appeal from: Suit No D1(D9) 22–501 of 1994 (High Court, Kuala Lumpur) and Civil Suit No 22–98 of 1994 (High Court, Johor Bahru)

*Wong Kim Fatt (Wong Boon Lee with him) (Gulam & Wong) for the appellants.*
*Vinayaga Raj (Wong Chee Lin with him) (Skrine) for the first to the sixth respondents.*
*V Vijayakumar (Albar & Partners) for the seventh respondent.*

**Gopal Sri Ram JCA** (delivering judgment of the court):

**[1]** This is the judgment of the court.

**[2]** The appeal herein is directed against the orders made by the High Court in a consolidated action of two suits. In one of these suits, *viz*, D1–22–501 of 1994 ('the KL action'), the plaintiffs are the lenders of a sum of RM20 million to the fifth appellant in this appeal. They sought to recover their loan from the fifth appellant as borrower and from the first to the fourth appellants as guarantors of the loan. In the other suit, 22–98 of 1994 ('the Johor Bahru action'), the plaintiff is the fifth appellant and the defendants are the first

respondent as trustee and agent of the other lenders as well as the receiver and manager appointed by the lenders over the business and affairs of the fifth appellant. The gist of the Johor Bahru action is that the first defendant in that action acted negligently and in breach of the terms and conditions of the loan agreement. This much is obvious from para 10 of the statement of claim and the declaratory relief sought at the foot of that pleading.

**[3]** The consolidated actions came on for hearing before the High Court at Kuala Lumpur. The learned judge who heard the matter dismissed the Johor Bahru action and entered judgment for the lenders in the KL action. In the present appeal the appellants' complaints are directed against the dismissal of the Johor Bahru action. This is hardly surprising. If the learned judge was wrong in dismissing that action it would follow that the lenders cannot succeed in their KL action.

**[4]** The learned judge in his judgment has carefully reviewed the evidence, in particular the oral testimony led by each side. He has also given careful consideration to the relevant documentary evidence. Most importantly, he has tested the story of each side against the contemporaneous documentary evidence and found the borrower's case to be wanting in credibility. He has also negatived any breach of duty or breach of contract on the part of the lenders, in particular the first defendant in the Johor Baru action (the trustee and agent of the lenders). Now, it is settled that the question whether there is a breach of a duty of care is one of fact. So is it also well settled that the question whether the terms of a contract were broken is an issue of fact depending on the facts and circumstances of each case. The findings made by the learned judge are therefore of pure fact based on the credibility of the witnesses called by the parties before him.

**[5]** We have said often enough that this court will not as a general rule, interfere with questions of fact decided by a trial court based on the credibility of witnesses seen and heard by that court. We are unable to detect any error on the part of the learned trial judge which takes this case out of the general rule. Quite the contrary. We have carefully scrutinised the evidence and find that it entirely supports the specific findings of fact made by the learned judge. We would also add, in fairness to the receivers and managers that not a shred of evidence of negligence was adduced against them. The learned judge was accordingly quite correct in dismissing the action against them.

**[6]** In these circumstances we are of the view that this appeal is devoid of merit. It is dismissed with costs. All orders made by the High Court are affirmed.

*Appellants' appeal dismissed with costs.*

Reported by AG Kalidas